

No. 14,613

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

HOMER C. MILLS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA, *ex rel.* SECURITIES AND  
EXCHANGE COMMISSION,

*Appellee.*

---

## BRIEF FOR APPELLEE.

---

SECURITIES AND EXCHANGE COMMISSION,

By WILLIAM H. TIMBERS,  
*General Counsel,*

DAVID FERBER,  
*Special Counsel,*

ELLWOOD L. ENGLANDER,  
*Attorney,*

G. M. CUTHBERTSON,  
*Attorney,*

1737 Federal Building,  
Los Angeles 12, California,

FILED

SEP - 2 1955

FRANKLIN RITTENHOUSE,

*United States Attorney,*

Post Office Building,  
Reno, Nevada.

*Attorneys for Appellee.*

PAUL P. O'BRIEN, CLERK



## SUBJECT INDEX

	PAGE
Statement .....	1
Argument .....	3

### I.

The decree of injunction is not subject to collateral attack in this action .....	3
--	---

### II.

Appellant's sales of securities were not exempt from the regis- tration provisions of the Act.....	3
Conclusion .....	6

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Edwards v. United States, 321 U. S. 473.....	5
Gompers v. Buck Stove & R. Co., 221 U. S. 418.....	3
Howat v. Kansas, 258 U. S. 181 .....	3
United States v. Seidman, 154 F. 2d 228.....	3
United States v. United Mine, 330 U. S. 258.....	3

STATUTES	
Securities Act of 1933, Sec. 2(11), 15 U. S. C. 77(b) (11).....	6
Securities Act of 1933, Sec. 3(b), 15 U. S. C. 77c(b).....	4
Securities Act of 1933, Sec. 5(a) (1), 15 U. S. C. 77e(a) (1)....	2

No. 14,613  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

HOMER C. MILLS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA, *ex rel.* SECURITIES AND  
EXCHANGE COMMISSION,

*Appellee.*

---

**BRIEF FOR APPELLEE.**

---

**Statement.**

This is an appeal from a judgment of criminal contempt entered against appellant for violation of a preliminary injunction issued by the United States District Court for the District of Nevada on April 3, 1952 [R. 13]. A final injunction was subsequently entered on June 30, 1953 [R. 23]. The defendant was placed on probation for three years.

The injunction resulted from a complaint filed by the Securities and Exchange Commission ("Commission") alleging that the appellant and the Searchlight Consolidated Mining & Milling Company ("Company") were

engaging in the sale of securities of the Company without registration in violation of Section 5(a)(1) of the Securities Act of 1933. The court filed its Findings of Fact and Conclusion of Law [R. 81-85] at the time of entering its preliminary injunction, and filed an opinion [R. 15-23] on March 17, 1953.

The preliminary injunction enjoined the defendants from making use of the mails or instruments of interstate commerce to sell the capital stock of the Company unless a registration as to such securities was in effect with the Commission with a proviso that it should not apply to any security or transaction which was exempt from registration. No appeal was taken.

Subsequent to the entry of the injunction, appellant continued to make a public offering of the stock.<sup>1</sup> He offered it to various persons and suggested that they offer it to others [R. 32, 34], offered a 20% commission to assist in disposing of it [R. 32, 34], and sometimes disposed of it through an intermediary [R. 43-44]. In addition to direct solicitation, newspaper advertisements were used [R. 111]. The mails were used [R. 26, 27-28, 30-40, 111], no registration was in effect [R. 151], and numerous sales were made [R. 44-50]. Appellant's brief does not dispute the facts nor did he dispute them in the court below [R. 102].

After a hearing the court below entered a judgment of criminal contempt from which this appeal was taken [R. 56].

---

<sup>1</sup>See affidavits [R. 25-44]. Appellant has admitted the truth of the facts stated therein [R. 102-104, 126]. See also testimony [R. 105-112].

## ARGUMENT.

### I.

#### The Decree of Injunction Is Not Subject to Collateral Attack in This Action.

As may readily be seen from the careful opinion of the district judge [R. 15-23], the facts amply sustain the validity of the injunctive decree. However, even if that were not so, it has long been settled that the injunctive decree is not subject to attack and cannot be relitigated in this action. "The propriety of an injunction can never be tested by an appeal from a subsequent judgment in contempt." *United States v. Seidmon*, 154 F. 2d 228 (C. A. 7, 1946). Assuming, *arguendo*, that a court in issuing an injunctive decree is in error, yet "until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." *Howat v. Kansas*, 258 U. S. 181, 189-190 (1922). See also *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 450 (1911). This is so "without regard even for the constitutionality of the act under which the order is issued." *United States v. United Mine Workers*, 330 U. S. 258, 293 (1947).

### II.

#### Appellant's Sales of Securities Were Not Exempt From the Registration Provisions of the Act.

To use appellant's words [R. 123], "the gist of this whole case completely" is his erroneous claim that his sales of securities were exempt from the registration provisions of the Act and therefore did not violate the injunction. We believe it is important to observe that these identical

contentions were made when the injunction was issued and that the court below painstakingly pointed out the error in appellant's argument in its opinion [R. 15-23] and in Finding No. 5 of its Findings of Fact [R. 83]. Appellant's continued sales to the public and his reiteration of these same invalid arguments cannot, therefore, be dismissed lightly as an inadvertent or innocent mistake.

Section 3(b)<sup>2</sup> of the Securities Act of 1933, 15 U. S. C., Sec. 77c(b), provides as follows:

“The Commission may from time to time by its rules and regulations, and *subject to such terms and conditions as may be prescribed therein*, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds \$300,000.” (Emphasis supplied.)

The Commission, pursuant to the statute, has adopted Regulation A which provides an exemption for certain classes of securities *under certain terms and conditions*.<sup>3</sup> One of these conditions, which appellant failed to perform, is the requirement that three copies of the soliciting ma-

---

<sup>2</sup>Incorrectly referred to in appellant's brief as Section 3(11)(b). The court below was similarly misled.

<sup>3</sup>We are at a loss to understand Point 2 of appellant's brief, page 7. If, contrary to the statute, the Commission could not enact rules and regulations, then no exemption would exist under Section 3(b) at all. But it is on this exemption that appellant attempts to rely.



terial be filed with the Commission five days prior to its use. The court below correctly found [R. 83-84] “that the offer of sale . . . was not made in accordance with the terms and conditions of any exemption from registration, and no such exemption was available \* \* \*”

Nevertheless, appellant continues to speak as if the securities were still exempt. It is important for the Court to recognize that there has been no Regulation A filing other than that which the court below, in the injunction proceeding, held appellant had nullified by his failure to file subsequent soliciting material. Accordingly, appellant’s repeated references to “permits,” and “suspension” and “termination” of such permits are misleading.<sup>4</sup>

The injunction enjoins both the Company *and* appellant from illegally selling Searchlight stock. Appellant attempts to distinguish between the Searchlight stock owned by the Company and the Searchlight stock owned by him, and claims that there was no restriction on the sale of his personally owned block of stock. But the injunction was not so limited and was properly not so limited.<sup>5</sup> Congress was as much concerned with secondary distributions by controlling persons as with the primary distribution by

---

<sup>4</sup>We do not know if appellant, by his generalized specification of errors, intends to press the point that the Commission was obliged to negative every possible statutory exemption [R. 133]. It is clear that even in criminal cases the burden of proving an exemption is on the defendant. *Edwards v. United States*, 321 U. S. 473 (1941).

<sup>5</sup>Particularly in promotions dominated by single individuals, it cannot always be easily ascertained whether stock being sold is that owned by the company or by the promoter. The company’s books [R. 46-49] showing the numerous certificates unaccounted for subsequent to the injunction illustrate the difficulties in this regard. That appellant did sell some of the company owned stock [R. 54] as well as his personal holdings is admitted, although he claims that the mails were not used in such transaction.

the corporation. See last sentence of Section 2(11) of the Act, 15 U. S. C., Sec. 77b(11).<sup>6</sup>

Appellant's attempts to becloud the issues are inadequate to conceal the simple facts; that he made sales to the public of securities that were not registered, and that no exemption was available—all in wilful violation of the court's decree.

### Conclusion.

The judgment should be affirmed.

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION,  
By WILLIAM H. TIMBERS,  
*General Counsel,*

DAVID FERBER,  
*Special Counsel,*

ELLWOOD L. ENGLANDER,  
*Attorney,*

G. M. CUTHBERTSON,  
*Attorney,*

*Attorneys for Appellee.*

FRANKLIN RITTENHOUSE,  
*United States Attorney,*

---

<sup>6</sup>For a statement of the Congressional purpose in enacting Section 2(11) see Report of Committee on Interstate and Foreign Commerce, 73rd Cong., 1st Sess., H. R., Report No. 85, pages 13-14. It was there pointed out that when individuals who own a substantial amount of the outstanding stock of a corporation seek to make a public offering thereof, such offering "may possess all the dangers attendant upon a new offering of securities" and such distributor is therefore "treated as equivalent to the original issuer" and "becomes subject to the act."